In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1823

GARY VAN GUNDY AND RIVERGATE NEWS AGENCY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners raise contentions identical to those decided in *Hamling* v. *United States,* No. 73-507, decided June 24, 1974. They contend (1) that their convictions must be reversed because they were tried under the *Roth-Memoirs* standards, which, they claim, this Court found impermissibly vague in its subsequent decision in *Miller* v. *California;* (2) that the indictment was insufficient; (3) that *scienter* was not established; (4) that the court excluded relevant evidence; and (5) that the application of both *Memoirs* and *Miller* standards by the court of appeals was a violation of *ex post facto* principles.

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted on two counts of receiving obscene material which had been shipped by common carrier in interstate

commerce, in violation of 18 U.S.C. 1462.[1] Petitioner Van Gundy was sentenced to two concurrent terms of eighteen months' imprisonment. Petitioner Rivergate News Agency, Inc. was fined $5,000 on each count. The court of appeals affirmed *per curiam* (Pet. App. A; 490 F. 2d 76).

On July 9, 1971, Red Ball Motor Freight, Inc. delivered 69 cartons of books, including the book "Wild Sexual Compulsions," to Rivergate News Agency in New Orleans, Louisiana. The books had been shipped from Los Angeles, California and were accepted at Rivergate News Agency by petitioner Van Gundy, the operator of Rivergate. A magazine entitled "L'Affaire No. 7" had been similarly shipped to Rivergate News Agency from New York in June, 1971.

1. Petitioners' contention that their conviction must be reversed because they were convicted under standards applicable prior to this Court's decision in *Miller* v. *California,* 413 U.S. 15, is without merit. As this Court ruled in *Hamling, supra,* slip op. at 12, petitioners should and did receive any benefits available to them from the *Miller* cases.

(a) The trial court instructed the jury to apply national standards of obscenity. Although the Court in *Hamling* held that jurors in federal obsenity cases should be permitted to draw on the standards of their own community, the Court further held that occasional references to the "country as a whole" in the trial court's instruction dealing with community standards did not materially affect the deliberations of the jury. *Hamling, supra,* slip op. at 12-20. Likewise the instruction here was not prejudicial error.

[1]Co-defendant Thevis was also convicted. His petition for a writ of certiorari, No. 73-1796, was dismissed by stipulation, August 16, 1974.

(b) The limitation of materials proscribed by 18 U.S.C. 1462 to those patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller (United States* v. *12 200- Ft. Reels of Film,* 413 U.S. 123) does not render 18 U.S.C. 1462 unconstitutionally vague as it was construed prior to *Miller. Hamling, supra,* slip op. at 20-25.

(c) *Miller's* rejection of *Memoirs'* "social value" formulation did not mean that 18 U.S.C. 1462 was unconstitutionally vague at the time of petitioners' convictions because it did not provide them with sufficient guidance as to the proper test of "social value" The social value formula was rejected in *Miller* not for reasons of vagueness but because it departed from *Roth's* obscenity definition and created a virtually impossible prosecutorial burden. *Hamling, supra,* slip op. at 26-27.

2. The indictment below was phrased in terms of the statute and was sufficiently definite to apprise petitioners of the charges against them. The statutory term "obscene" is a term of art and thus gave adequate notice to petitioners. *Hamling, supra,* slip op. at 27-29.

3. The district court instructed the jury that the government must show that petitioners had knowledge of the character of the contents of the publications at the time they caused them to be transported to Louisiana and received by them in the state. This *scienter* ruling was constitutionally sufficient. *Rosen* v. *United States,* 161 U.S. 29. The evidence was, as the court below found, sufficient to support the jury's verdict. *Hamling, supra,* slip op. at 29-34.

4. The trial court did not abuse its discretion by excluding allegedly comparable materials. "Expert" testimony had been allowed concerning relevant community standards. Moreover, similiar materials or judicial deter-

minations with respect thereto do not necessarily prove non-obscenity of the materials the accused is charged with bringing into Louisiana. *Hamling, supra,* slip op. at 35-37.

5. The review by the court of appeals under both the *Memoirs* and the *Miller* standard (see *United States* v. *Thevis,* 484 F. 2d 1149) did not violate *ex post facto* or due process principles. By allowing petitioners any benefits from either, the court did not make criminal any conduct that was legal prior to *Miller.* The enumeration of specific categories of obscene material in *Miller* did not purport to proscribe, for purposes of 18 U.S.C. 1462, conduct that had not previously been thought criminal, but instead added a "clarifying gloss" to the prior construction, making the statute's meaning more definite. *Bouie* v. *City of Columbia,* 378 U.S. 347, 353. *Hamling, supra,* slip op. at 25-26.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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